

WESTERN NUCLEAR, INC.

IBLA 80-811

Decided May 26, 1981

Appeal from decision of the New Mexico State Office, Bureau of Land Management, declaring 36 lode mining claims or portions thereof null and void ab initio. NM MC 24383 through 24418.

Affirmed in part, reversed in part.

1. Act of June 25, 1910 -- Mining Claims: Lands Subject to -- Mining Claims: Withdrawn Land -- Withdrawals and Reservations: Authority to Make -- Withdrawals and Reservations: Effect of

Where an executive order issued subsequent to the Pickett Act of June 25, 1910, as amended, 43 U.S.C. §§ 141, 142 (1970), does not specifically close all lands withdrawn under any authority other than the Act, the said lands are open to exploration, discovery, occupation, and purchase under the mining laws of the United States so far as the same apply to metalliferous minerals.

APPEARANCES: Jerry L. Haggard, Esq., Evans, Kitchel & Jenckes, P.C., Phoenix, Arizona, for appellant.

OPINION BY ADMINISTRATIVE JUDGE STUEBING

Western Nuclear, Inc., has appealed the decision of the New Mexico State Office, Bureau of Land Management (BLM), dated June 27, 1980, declaring 36 of appellant's Can lode mining claims null and void ab initio in part.

On June 5, 1978, BLM received copies of location notices for 178 lode mining claims which appellant filed in compliance with section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), and Departmental Regulations 43 CFR Part 3833. The decision stated that 36 of appellant's claims (NM MC 24383 through 24418)

located in whole or in part in secs. 35 and 36, T. 18 S., R. 18 W., New Mexico principle meridian, New Mexico, were null and void ab initio, in that they were either located on land withdrawn pursuant to an executive order (Exec. Order No. 5889) or on patented land (patent No. 1182504) and therefore not open to mining location.

It is well established that a mining claim located on land which is not subject to mineral entry at the time of location is null and void from its inception. Glen H. Brooks, 45 IBLA 51 (1980); Ray L. Virg-in, 33 IBLA 354 (1978) and cases cited therein.

Western Nuclear, Inc., has limited its appeal to that portion of the decision which holds that certain claims and portions of claims located in sec. 35 are null and void by reason of having been located in sec. 35, which is withdrawn land.

In its statement of reasons on appeal appellant contends that the BLM decision was in error in that Exec. Order No. 5889 expressly limited the withdrawal to the authority and the exceptions to the authority provided for in the Act of June 25, 1910, (36 Stat. 847-48), as amended by the Act of August 12, 1912 (37 Stat. 497), commonly referred to as the "Pickett Act." 43 U.S.C. § 142 (1976).

[1] Appellant notes that the 1912 amendment to the Pickett Act provides: "All lands withdrawn under the provisions of this section and Section 141 of this title shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals * * *." Appellant further contends that Exec. Order No. 5889 did not apply or refer to any other authority by which the subject lands were closed to mining location under the general mining laws. Finally, appellant asserts, the Can claims were located for the purpose of the exploration and development of uranium, a metalliferous metal.

In addition to statutory authority to withdraw or reserve portions of the public land, prior to October 21, 1976, the President had nonstatutory authority to which Congress had given its implied approval. 1/ United States v. Midwest Oil Co., 236 U.S. 459 (1915). A withdrawal made pursuant to this authority is not impaired or affected by the Pickett Act, supra. P. & G. Mining Company, 67 I.D. 217 (1962); Alaska Pipeline Co., 38 IBLA 1 (1978).

Exec. Order No. 5889 states in part:

1/ This authority was explicitly repealed by section 704(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2792 (1976).

Under authority of the act of Congress approved June 25, 1910 (36 Stat. 847-848), as amended by the act of August 24, 1912 (37 Stat. 497), it is hereby ordered that the following-described tracts of public lands in New Mexico be, and they are hereby, withdrawn from settlement, location, sale, or entry, except as provided in said acts * * * subject to any valid rights or claims initiated prior to the date hereof * * * T. 18 S., R. 18 W. sec. 35, all.

In the present case the President chose not to exercise such additional implied or inherent authority as he had to selectively withdraw lands from all types of location under the mining laws, including those for metalliferous minerals.

We conclude that where, as here, an executive order issued solely pursuant to the Pickett Act of June 25, 1910, as amended, 43 U.S.C. §§ 141, 142 (1976), withdraws land, the said land is open to exploration, discovery, occupation, and purchase under the mining laws of the United States so far as the same apply to metalliferous minerals.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed in part and reversed to the extent of the holding with respect to the claims in said sec. 35.

Edward W. Stuebing
Administrative Judge

We concur:

Douglas E. Henriques
Administrative Judge

James L. Burski
Administrative Judge

